U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, D.C. 20001-8002

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DATE: February 4, 2000
CASE NO.: 1996-INA-0283

In the Matter of:

FILTER MANAGEMENT, INC.
Employer

On Behalf Of:

HANS GEORG LUDECKE
Alien

Appearance: Abbe Allen Kingston, Esq.
For the Employer/Alien

Certifying Officer: Charlene G. Giles, Region VI

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 17, 1995, Filter Management, Inc. ("Employer") filed an application for labor certification to enable Hans George Ludecke ("Alien") to fill the position of Vice President of Sales (AF 114). The job duties for the position are:

> Serve as the vice president of sales. As the Vice President of Sales will direct and coordinate all aspects of continued expansion into the relevant markets, will direct marketing research, formulate corporate policies at divisional level, ensure the validity of financial reports, expand & train divisional sales force as needed, introduce promotional programs. Represent Company at Board meetings as needed, and serve as spokesperson for the company's position concerning proposed ventures and protection of interests in domestic markets.

The requirements for the position are three years' experience in the job offered or three years' experience in the related position of Management Position in Sales of Industrial Machinery. Other special requirements are three years' experience in sales of filter recycling machines.

The CO issued a Notice of Findings on October 30, 1995 (AF 25), proposing to deny certification on the grounds that the Employer's other special requirements require three years experience in the sales of filter recycling machines, but the ETA 750 part B does not show the Alien has the required three years of experience in violation of 20 C.F.R. § 656.21(b)(5).

In its rebuttal, dated December 15, 1995 (AF 20), the Employer submitted a letter from the Alien stating that he sold filter recycling machines for his own company, Ludecke Fittings, during the period from 1984 through 1989. The Employer therefore contended that the Alien possessed the required experience, and the position is listed at the actual minimum requirements.

On January 23, 1996, the CO sent a letter to the Employer's attorney stating that the Notice of Findings required the Rebuttal to be sent to the CO via certified mail on or before December 4, 1995, but that the rebuttal was not postmarked until December 15, 1996, and received in the CO's office until January 8, 1996 (AF 12). The CO notes that the rebuttal package references a request for extension submitted on November 29, 1995, but there was no documentation to support this claim, and no evidence that any extension was ever granted. Accordingly, the CO informed Employer's counsel that in view of the fact that no rebuttal was

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

submitted within the 35 day limitation, the October 30, 1995 automatically became the final decision of the Secretary denying labor certification.

On February 6, 1996 the Employer's counsel submitted a copy of a FAX requesting an extension dated November 29, 1995 (AF 8).

On February 15, 1996, the CO submitted a letter to Employer's Counsel stating his office has no record of the receipt of any request for an extension, that the evidence submitted on February 6, 1996 is inconclusive and unacceptable as verification of a request for extension (AF 5).

On March 20, 1996, the Employer appealed and requested reconsideration (AF 2). The CO denied reconsideration on March 27, 1996 and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board") (AF 1).

Discussion

Section 656.25(c) directs the CO to advise the employer in the NOF that rebuttal evidence or argument must be mailed to the CO, **by certified mail**, before a specified date thirty-five calender days from the issuance of the NOF. The requirement for submitting documentation by certified mail is not merely a technicality, but rather an important provision designed to prevent disputes over whether a rebuttal was timely mailed. The 35 day statute of limitations will not be tolled except for rare instances where extraordinary relief was require to avoid manifest injustice. *See Park Woodworking, Inc.*, 90-INA-93 (Jan. 29, 1992)(*en banc*); *Madeline S. Bloom*, 88-INA-152 (Oct. 13, 1989).

The regulations specify that an employer's failure to file a rebuttal in a timely manner:

1) converts the NOF into an FD denying certification,
2) constitutes a refusal to exhaust all administrative remedies, and
3) bars access to Board review.

20 C.F.R. § 656.25(c)(3)(i)-(iii).

In this case, the Employer argues that a timely request for extension was faxed to the CO's office. The CO contends that no document was ever recorded as being received in the office, nor was any such request granted. However, labor certification is properly denied where a timely request for extension was not filed by certified mail, and thus the employer cannot document a timely filing. *See Gabai Construction, Inc.*, 92-INA-335 (Aug. 17, 1993); *Casa De Montessori*, 92-INA-105 (Jan. 5, 1994). Here, the Employer could have sent his request for extension by certified mail as detailed in Section 656.25(c), but chose instead to send the request by fax. We are not inclined to consider a faxed request as the same as certified mail, nor are we inclined to allow the Employer to determine what is a properly submitted request for extension under the regulations. *See Comprehensive Specialists Medical*, 91-INA-370 (Jan. 14, 1994); *Roloando Tamayo*, 93-INA-96 (Feb. 8, 1994).

Moreover, this case is not one where, but-for the untimely extension request, the granting of labor certification to the Employer was merely a ministerial formality, as the documentation

that the Alien had the required experience was simply a letter from the Alien. *See Park Woodworking, Inc.*, *supra*; *Madeline S. Bloom, supra*.

In summary, we find that the Employer has not established that it filed a timely request for extension nor that the statute of limitations must be tolled to avoid manifest injustice. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.